3. **IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JOHDPUR**

JUDGMENT

The New India Assurance Company Limited Vs. Ramavtar Sharma and others.

S.B. CIVIL MISC. APPEAL NO.1376/2006.
Against the award dated 11.11.2005 made by the Motor Accidents Claims Tribunal [Special Judge, Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Cases], Bikaner in Claim Case No. 365/2005.

Date of Judgment :: 26th March 2007.

HON'BLE MR. JUSTICE DINESH MAHESHWARI

Mr. Lalit Vyas, for the appellant.
Mr. B.K. Vyas, for the respondent No.1.
Mr. R.C. Joshi, for the respondent No.3.

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BY THE COURT:

This appeal under Section 173 of the Motor Vehicles Act, 1988 ('the Act') has been preferred by the insurer of the vehicle involved in accident against the award dated 11.11.2005 made by the Motor Accidents Claims Tribunal [Special Judge, Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Cases], Bikaner in Claim Case No.365/2005 questioning the quantum of compensation awarded by the

Tribunal at Rs.6,50,000/- to the claimant-respondent No.1 for the loss suffered by him due to the injuries sustained in a vehicular accident.

This appeal was taken up for consideration on 11.01.2007 when learned counsel for the appellant pointed out that though this appeal has been submitted questioning only the quantum of compensation awarded by the Tribunal but, looking to the facts of the case and subject matter of this appeal, the appellant of its own had deposited with the Tribunal an amount of Rs.2,72,406/-, of course without prejudice to its contentions in this appeal, on a broad estimate that it would represent the principal amount of Rs.2,50,000/- and interest thereupon towards compensation payable to the claimant. This Court found the insurer discreet in its approach in coming out with a reasonable deposit particularly when it is not the contention that no amount whatsoever is payable to the claimant. After considering the impugned award in its totality, this Court issued notices for final disposal and until further orders, execution of the award against the appellant-insurer beyond the amount deposited was ordered to be stayed.

The respondent No.1, claimant, and the respondent No.3, owner of the offending vehicle, have put in appearance and service on the respondent No.2, driver, has been dispensed with. Learned counsel for the parties have been heard at length

and record has been scanned through.

A brief reference to the background facts may be made thus: The claimant Ramavtar Sharma made the claim for compensation before the Tribunal on 24.08.2001 with the submissions that on 23.09.1999 at about 3:45 p.m. in front of Veterinary Hospital located within the jurisdiction of Police Station Kot Gate, Bikaner, while proceeding to the office of his employer on motorcycle bearing registration No. RJ07 4M 1151, he was hit by an oncoming jeep bearing registration No. RJ07 G 2661; that due to the accident he sustained several bodily injuries, somehow reached hospital hiring a taxi, and got himself admitted; that he sustained injuries of fractures of nasal bone and of right tibia and fibula bones that required several operations and bone grafting; and that his motorcycle was extensively damaged.

The claimant averred that he remained hospitalised on Bed No.45 in 'Z' Ward at P.B.M. Hospital, Bikaner from 23.09.1999 to 04.10.1999 during which period his leg was operated upon and while being put under a plaster-cast, he was advised complete rest; that he remained hospitalized again from 19.11.1999 to 11.12.1999 for bone grafting and yet again from 13.02.2000 to 19.02.2000 for removal of rod; and, according to the claimant, from 23.09.1999 to 31.08.2000 he remained confined to bed as per medical advice.

The claimant stated that he was 41 years of age, employed as Development Officer with the New India Assurance Company Limited (the appellant insurance company), having monthly salary at Rs.15,000/- in the year 1999-2000, and having paid income tax at Rs. 16,992/-; that he was required to undertake field work; that in the financial year ended 31.03.1999, his employer-company allowed an amount of Rs.67,440/- towards incentives; that after the accident he was unable to drive a motorcycle because of bone grafting and could not execute field work and hence was deprived of the amount of incentive that was otherwise likely to have enhanced in future; that there was restriction of movement of his right leg and the doctors have certified it to be 25% permanent disablement. Upon and with reference to these averments the claimant suggested that he has suffered the loss of incentive at Rs.1,00,000/- per annum and has suffered this loss for 19 years in the sum of Rs.19,00,000/-. Claiming further Rs.5,00,000/- towards physical pain and sufferings and Rs.1,00,000/- towards special diets and leaving aside the amount of treatment expenditure for the same having been received under Medi-Claim Policy, the claimant sought compensation in the sum of Rs.25,00,000/- against the driver, owner and insurer of the aforesaid jeep.

The driver and owner of the offending vehicle while filing joint reply submitted that the accident occurred for the motorcycle of the claimant skidding on the road; and that the claimant sustained injuries only from the motorcycle and the road. It was also stated that the jeep in question was insured and liability, if any, was that of the insurer, non-applicant No.3.

The non-applicant No.3 (insurer-appellant) submitted a separate reply to the claim application and while stating general denial averred that the accident did not occur for any fault or negligence on the part of the driver of the vehicle insured. In relation to the quantum of compensation, the insurer submitted that neither the claimant was rendered unfit to drive a motorcycle nor his driving licence has been cancelled on that count; that the claimant still continued on the field work and there was no reduction in his pay or post; that allowing of incentive always depends upon the business procured and the claimant was allowed such incentive on his business; and that he was not incapacitated to do the field work nor has extended any such information to his employer of his inability to execute the field work. It was also submitted that the compensation, if at all, be assessed on the principles of contributory negligence.

On the pleadings of parties, the Tribunal framed the following issues for determination of the questions involved in the case:-

"(1) आया दिनांक 23-9-99 को सड़क आम गोगागेट घूमचक्कर के पास (पशु चिकित्सालय के पास) अप्रार्थी शिवदान ने वाहन मिनीट्रक जीप न0 आर.जे. 07-जी-2661 को तेजगति, गफलत व लापरवाही से चलाकर मोटरसाईकल आर, जे, 07-4 एम-1151 को सामने से टक्कर मारकर दुर्घटना कारित की जिससे मोटरसाईकल पर सवार प्रार्थी के साधारण व गंभीर चोटें आयीं और स्थायी निर्योग्यता कारित हुई ?

- प्रार्थी

(2) क्या प्रार्थी अपने शरीर पर आयी चोटों के फलस्वरूप अप्रार्थीगण से प्रतिकर स्वरूप 25,00,000/= रू. अथवा अन्य कोई राशि प्राप्त करने का अधिकारी है ?

- प्रार्थी

(3) क्या यह दुर्घटना स्वयं प्रार्थी द्वारा मोटर साईकल को तेज चलाने एवम् स्वयं की गलती से स्लिप हो जाने के कारण हुई ?

- अप्रार्थीगण

(4) क्या बीमा कंपनी - न्यु इंडिया एश्योरेंस कंपनी द्वारा प्रस्तुत जवाबदावे में ली गई आपत्तियों के आधार पर प्रतिकर अदायगी के लिये बीमा कंपनी उत्तरदायी नहीं है ?

- अप्रार्थी सं03

(5) अनुतोष ?"

In evidence, only the claimant examined himself as AW-1 and produced documentary evidence as Exhibits 1 to 25. The non-applicants did not lead any evidence at all.

After hearing the parties, the Tribunal found in issue No.1 that the accident occurred for speed driving of the jeep and there was no negligence on the part of the claimant. The Tribunal also found from the injury report (Ex.8) and X-ray

report (Ex.9) that the claimant sustained fracture of tibia and fibula bones and fracture of nasal bone; and on the basis of medical board's report (Ex.14) found that he has suffered 22% permanent disablement.

While rejecting other contentions of the insurer, the Tribunal took up quantification of compensation in issue No.2 and considered the averments, statements, documents and contentions of the claimant and so also the contentions of the appellant insurer that now the claimant was admittedly getting salary of Rs.20,000/- per month and was regularly attending on his work and at the most he was entitled to compensation for the hospitalisation period and not beyond. The Tribunal observed that (at the time of accident) salary income of the victim was Rs.15,000/- per month; that there was no evidence in rebuttal on behalf of the non-applicants; that the work of the claimant as Development Officer essentially required field work; that because of fracture and bone grafting, his earning capacity was adversely affected and he has lost the same to the extent of 22% and, therefore, it could be taken that there has been loss of 22% earnings of the claimant. The Tribunal thereafter referred to the income tax return of the claimant for the financial year 01.04.1999 to 31.03.2000 wherein his annual income has been shown at about Rs.1,80,000/- and on this basis, the Tribunal assessed his annual loss at Rs.39,600/-,

that is, 22% of Rs.1,80,000/-. In view of the age of the claimant at 41 years, the Tribunal considered it appropriate to apply multiplier of 15 and, thus, assessed pecuniary loss at Rs.5,94,000/- (Rs.39,600/- x 15). The Tribunal further allowed Rs.35,000/- towards pains and sufferings and Rs.21,000/- towards special diets and in this manner assessed total loss for the claimant at Rs.6,50,000/- and while making the award in this amount allowed interest @ 7.5% per annum from the date of filing of the claim application after adjustment of Rs.25,000/- received under 'No Fault Liability'.

Assailing the award aforesaid, learned counsel for the appellant-insurer has referred to the statement made by the claimant in his cross-examination and submitted that admittedly the claimant was getting full salary and there has not been any substantial loss in his earnings; that the claimant has not produced any cogent evidence in relation to his so-called incentive income and loss, if any, in such income; and assessment of pecuniary loss at Rs.5,94,000/- being highly excessive and exorbitant, deserves modification. On the other hand, learned counsel for the claimant raised objection in the first place with reference to the decisions of this Court in National Insurance Company Ltd. Vs. Mahavir Prasad Malpani & Ors.: 2006 RAR 445 (Raj.); and Oriental Insurance Co. Ltd. Vs. Smt. Bhanwari Devi & Ors. : 2005 (4) WLC (Raj.) 358 that

the appellant-insurer has not obtained any permission under Section 170 of the Act so as to contest the matter on merits and, therefore, its appeal assailing only the quantum of compensation is fundamentally incompetent. Learned counsel has referred to the order sheet dated 22.12.2004 and submitted that on this date an application under Section 170 of the Act was moved by the appellant-insurer but no any permission was accorded by the Tribunal. Learned counsel further submitted that due to permanent disablement, there has been loss of income from commission that was earned by the claimant of his own efforts by field work and that being a substantial recurring loss for the claimant in 41 years of age, the Tribunal has not been in error in providing for 22% loss of income on the basis of return of the year 1999-2000; and the quantum awarded by the Tribunal cannot be said to be excessive so as to warrant interference in this appeal at the instance of the insurer of the vehicle involved in accident. Learned counsel further submitted that the appellant-insurer itself being the employer of the claimant was possessed of the best evidence in relation to his income and could have produced the same so as to controvert the statements of the claimant if there was no reduction in his incentive income; but the appellant chose not to lead any evidence and, therefore, there was no reason for the Tribunal not to accept the statements made by the claimant.

Having given a thoughtful consideration to the submissions made by the learned counsel for the parties, having examined the impugned award, and having scanned through the entire record, this Court is clearly of opinion that the award as made by the Tribunal in the sum of Rs.6,50,000/- together with interest @ 7.5% per annum remains highly excessive than that of just compensation admissible in this case; and cannot be sustained.

The submission made on behalf of the claimant-respondent on competence of this appeal by the insurer of the vehicle involved in accident for want of permission under Section 170 of the Motor Vehicles Act remains fundamentally contrary to the record of the case. The application moved by the appellant-insurer under Section 170 of the Act is available at page B/15 of the record and, instead of recording in the order-sheet, the learned Judge of the Tribunal has chosen to accord permission on the body of this application itself; and has distinctly stated so in the words 'Permitted'. It is moreover apparent from the record that the claimant was cross-examined this very date, i.e. 22.12.2004, by the appellant-insurer in respect of the quantum of compensation too; and but for such permission, the appellant-insurer could not have effectively taken up such cross-examination. The decisions referred by the learned counsel for the claimant-respondent rule out their

applicability to the present case for the facts to the contrary available on record; and rather, on principle, both the decisions cited by learned counsel for the claimant operate against the objection sought to be raised on behalf of the claimant.

Mahavir Prasad (supra) was a case where the claimant had suffered fracture of back-bone and was awarded compensation in the sum of Rs.8,05,000/-; and the appeal by the insurer questioning only the quantum of compensation was disallowed by the learned Single Judge because the insurance company has failed to obtain permission as required by Section 170 of the Act. In intra-court appeal, the insurer relied upon the decision of the Hon'ble Supreme Court in the case of United India Insurance Co. Ltd. Vs. Jyotsnaben Sudhirbhai Patel & Ors.: 2003 ACJ 2107; however, the same was distinguished by the Hon'ble Division Bench after noticing that in the said case, the Tribunal granted permission but not with speaking order; and the Hon'ble Division Bench observed that if the Tribunal failed to pass speaking order on an application under Section 170 of the Motor Vehicles Act, surely the insurance company could not be faulted on that count. For the case at hands, the Division Bench found that before the Tribunal though an application was moved for such permission but never any order was sought thereupon and attention of the Tribunal was never drawn to such application; and this Court considered it

inequitable to remand the matter at that stage. Then, it appears that only the rate of interest allowed by the Tribunal at 12% per annum was sought to be questioned and such contention was rejected for the award having been made pertaining to the matter of the year 1984 and rate of interest was found in consonance with the then prevalent rates. The said decision of the Hon'ble Supreme Court in Jyotsnaben directly applies to the present case where the Tribunal has granted permission, albeit with a non-speaking order. In the case of Oriental Insurance Co. Ltd. Vs. Bhanwar Devi the insurer having not obtained permission under Section 170 of the Act, attempted to question the quantification of compensation and so also the finding on responsibility towards the accident by filing a writ petition, that was rejected by this court for the reason that the award was appealable under section 173 of the Act.

Moreover, it cannot be adopted as an absolute proposition of universal application that in every case where the insurer does not have permission under Section 170 of the Motor Vehicles Act and is, therefore, not entitled to file an appeal, for that reason alone the amount allowed by the Tribunal, whatever, is required to be affirmed if otherwise not challenged by the owner or driver of the vehicle. In such claim cases, just compensation is to be allowed to the claimant/s on the basis of and in accord with the broad principles governing

assessment of loss and quantification of compensation; and ultimately it is the 'just' compensation that is the concern of the Tribunal and the Courts and it has not been countenanced as an abstract theoretical principle that if there is no permission under Section 170 of the Motor Vehicles Act, the award remains a fait accompli and beyond correction by the appellate court; even when the same is ex-facie shockingly disproportionate to a just and reasonable compensation. However, as noticed above, in this case, there has been a permission under Section 170 of the Act and the appellant is justified in maintaining this appeal for the amount of compensation having been awarded squarely contrary to the requirements of law and even against the facts available on record.

It is of course available on record that the claimant, then about 41 years of age, suffered for fractures of tibia and fibula bones on upper two-third part as stated in the X-ray report (Ex.9); and his repeat hospitalisation of different durations could also not be doubted. However, the award of compensation in the sum of Rs.6,50,000/- remains highly excessive and exorbitant for several reasons that follow hereafter.

It is noticed that the disability certificate (Ex.14) was drawn on 03.08.2001 by a medical board said to have been constituted under the order of the Superintendent, Associated

Group of Hospitals, Bikaner dated 25.07.2001. This certificate (Ex.14) is available at page C-4/26 of the record and a photostat of the letter forwarding the same, though filed by the claimant but not distinctly got exhibited in evidence, is available at page C-4/25. The said document at page C-4/25 shows that the certificate (Ex.14) was issued by a review medical board constituted on an application dated 20.06.2001 made by the claimant. It has not been shown as to what were the original findings of the medical board whose review was requested by the claimant.

The board examining the claimant on 31.07.2001 has observed from photostat of the discharge ticket that he was admitted for treatment of compound fracture; that internal fixation and bone grafting was done; that fixation was removed in February 2000; and that the plaster cast was removed in the month of May 2000. The board has observed that at the time of examination, fracture of tibia had united but the fracture of fibula upper end had not; that there was painful limitation on movement of right ankle; and because of this, he could not walk and squat properly; and, according to the board, this amounted to permanent physical impairment of 22%.

The findings as stated by the said review medical board are more of obscurity than of clarification; and give rise to more questions. It has not been shown anywhere on record

that if the fracture of fibula upper end was not united even on the date of examination, i.e. 31.07.2001, though the accident occurred on 23.09.1999, two operations had been performed, bone grafting had been done and plaster cast had been removed as back as in the month of May 2000, then what was the line of further treatment? On the contrary, the claimant has admitted in his cross-examination that apart from the material placed on record there was no further treatment. Then, for limitation of movement of a particular joint, the board has stated in a cryptic manner that there was permanent physical impairment of 22% without stating at all whether the disablement related to the particular joint or limb or of the whole body?

However, having regard to the overall circumstances of the case, even if this figure of 22% disablement is taken as it is, it is very difficult to countenance the submission that because of such alleged disablement at a leg joint, there had been reduction of 22% earning capacity of the claimant. The board has stated only in the vague and uncertain words that 'he cannot walk and squat properly'. It cannot be accepted on the basis of disablement certificate (Ex.14) that there had been reduction of 22% earning capacity looking to the job, of Development Officer of an insurance company, the claimant is engaged in.

Over and above all such shortcoming in its approach, in simply picking up the percentage in numeral 22 from out of this medical boards' report in absolute terms to form the basis for assessment of pecuniary loss, the Tribunal has seriously erred in law as well as on facts in picking up annual income of the victim at Rs.1,80,000/- with reference to the income tax return for the financial year 1999-2000 and in taking 22% thereof for the purpose of assessing pecuniary loss. The assessment so made by the Tribunal is contrary even to the case set up by the claimant himself. A look at the cross-examination of the claimant shall clarify the position. The entire cross-examination of the claimant reads thus,-

> "यह सही है कि दवाईयों के सारे बिलों का भुगतान मेडि-क्लेम पॉलिसी के तहत राशि मिल चुकी है । मेरी कम्पनी द्वारा मेरे द्वारा ली गई समय समय पर छुट्टियों के पैसे नहीं काटे हैं तथा छुट्टियों की अवधि का सारा भुगतान प्राप्त कर लिया है, मैंने छुट्टियों का कोई क्लेम नहीं किया है । वर्तमान में मुझे मासिक वेतन के रूप में रूपये 20,800/= प्रतिमाह मिलता है । इस दुर्घटना के बाद से मैं मुझे दिया गया टार्गेट 40-45 प्रतिशत ही पूरा कर पाता हूँ । इस बाबत मुझे इन्सेटिव चार्जेज नहीं मिलते है । क्योंकि कम टार्गेट कर पाता हूँ । मैं घर से कार्यालय को अपने मोपेड स्कूटी पर जाता हूँ जो कि सेल्फ स्टार्ट है । यह सही है कि वर्ष 1998-99 में आयकर की राशि रूपये 27,160/= थी । यह सही है कि मैंने जो पत्रावली पर इलाज बाबत रेकार्ड पेश किया है उसके बाद मेरा कोई इलाज नहीं हुआ । यह कहना गलत है

कि मेरे शरीर में अभी भी दर्द नहीं होता हो । यह कहना गलत है कि दुर्घटना मेरी गलती के कारण हुई हो । यह कहना सही है कि मैं दुर्घटना के बाद लगातार अपना काम कर रहा होवूं और कार्यालय आता जाता हूँ ।"

(underlining supplied)

In the statement made on 22.12.2004, the claimant has pointed out that he was getting monthly salary of Rs.20,800/-. Admittedly, at the time of accident he was getting salary of about Rs. 15,000/- per month. Thus, there has not been any loss of salary income; on the contrary, the claimant seems to have duly received the increments from his employer. The component of salary income of the claimant having not suffered any loss at all, it is extremely difficult to appreciate that such salary income figure has been taken by the Tribunal as the basis of taking the multiplicand at Rs. 39,600/- (22% of Rs. 1,80,000/-). The claimant himself stated nothing of loss beyond the fact that he was able to complete the targets to about 40-45% and was losing on incentive income. Obviously, the Tribunal has not examined the facts directly available on record.

So far the incentive income is concerned, a look at the tax return for the accounting year 1999-2000 (Ex.24) brings out a scenario that the income of the claimant from salary has been shown at Rs.1,79,582/- and from other sources at Rs.1,240/- leading to gross income at Rs.1,80,822/- and after deduction of the amount under Section 80L and 80D, total

income has been taken at Rs.1,77,199/-; and income tax has been calculated thereupon. The accident in question occurred on 23.09.1999. The said return (Ex.24) does not show any amount having been received by the claimant towards so-called commission or incentive. It cannot be assumed that for good 5½ months before the accident, the claimant had not earned any business for the Company in the said accounting year; and if that were so, then, even the component of incentive income becomes doubtful a proposition. However, the claimant, though has not produced his tax return of the previous year of 1998-1999, has placed on record a performance appraisal report (Ex.25) and it appears that the employer-company considered it proper to allow growth incentive to him at Rs.67,440/-. The claimant has suggested that after the incident, he was able to complete targets only at 40-45 per cent and, therefore, he was not receiving incentive income.

Therefore, In the overall circumstances of the case, with the non-applicant insurer having not rebutted such aspect of evidence about loss on incentive income, particularly when it alone being the employer of the claimant was in a position to place relevant material if there was no loss on incentive income too, this Court is of opinion that even on most liberal assessment, if the amount of Rs.67,440/- as said to have been earned by the claimant in the year prior to the year of accident

is taken as the basis for considering his pecuniary loss and the alleged 22% impairment is taken to be loss of such earning capacity then too, it would lead to the annual loss at Rs.14,836.80 and if capitalised by maximum multiplier of 15 total loss comes to Rs.2,22,552/-. This Court is of opinion that in the overall facts and circumstances of this case, there appears no reason to allow any other component of loss towards earnings and other service conditions in view of the statement made by the claimant that he had received entire payment of his leave and that he has not made any claim in that relation. It appears that the claimant was out of plaster cast in the month of May 2000 and the suggestion as made, of having remained on leave upto 31.08.2000, does not inspire confidence.

The Tribunal has allowed Rs. 35,000/- towards pain and sufferings; and Rs. 21,000/- towards special diets. In the circumstances of the case, it does appear to be a case of some loss of amenities of life, some restriction of movement, and may be some extra pain and sufferings but only reasonable amount of compensation could be considered on that score. However, when the assessment of loss has been made hereinbefore with liberal calculation taking 22% disability as it is, taking entire of the incentive income towards the loss, and with application of maximum side multiplier of 15, this Court is of

opinion that interest of justice shall be served if a further amount of Rs.21,448/- is allowed on all other counts to make the award in the round figure, of Rs. 3,00,000/-.

Thus, it is apparent that even on most liberal estimate, the claimant is entitled for compensation in the sum of Rs. 3,00,000/- and not beyond. The award as made by the Tribunal in the sum of Rs.6,50,000/- being highly excessive and rather more than double the amount of just compensation admissible in this case cannot be sustained and deserves modification. However, looking to the period of accident and the date of award, the rate of interest at 7.5% per annum as allowed by the Tribunal is retained.

Accordingly, this appeal succeeds to the extent indicated above and is partly allowed; the impugned award dated 11.11.2005 is modified and in place of Rs.6,50,000/- awarded by the Tribunal, the claimant is allowed total compensation in the sum of Rs.3,00,000/- together with interest @ 7.5% per annum from the date of filing of the claim application.

It shall be required of the appellant-insurer to deposit the amount, if any, now payable under the modified award within 30 days with the Tribunal, of course after adjustment of the amount already paid/deposited. The parties shall bear their own costs of this appeal.

Mohan/ **(DINESH**

MAHESHWARI), J.